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Supreme Court, U.S.
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No. 03-1348

IN THE

Supreme Court of the United States

EDMUND KO,

Petitioner,

- against -

THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

BRIEF FOR RESPONDENT

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May 24, 2004

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03-1348

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2003

EDMUND KO,

Petitioner,

-against-

THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

Respondent State of New York respectfully files this brief in opposition to petitioner's petition for a writ of certiorari to the New York Supreme Court, Appellate Division First Department. That writ is sought in connection with an opinion and order of that court, rendered on April 23, 2003, and reported at 304 A.D.2d 451, 757 N.Y.S.2d 561 (1st Dept. 2003), affirming petitioner's conviction, after trial, of Murder in the Second Degree.

STATEMENT OF THE CASE

Petitioner's conviction resulted from his murder of his former girlfriend, Hyeseung Lynda Hong, on March 18, 1998. Petitioner and Hong had ended their relationship about 18 months before her death, and petitioner had since become involved with Claudia Seong. Although petitioner and Hong had initially remained in contact after the termination of their relationship, by the spring of 1997, they had ceased speaking, until the night of Hong's death.

That night, Hong was on the phone with a friend, Celine Oh, when her call waiting function signaled that she had another incoming call. Hong interrupted her conversation with Oh to take this call. When she returned to Oh, she relayed that petitioner had called and that she was permitting him to come over. After the conversation continued for a few more minutes, Hong announced that petitioner had arrived and hung up. Although she promised to call Oh after petitioner left, she never did. While in the apartment, petitioner slit Hong's throat twice, causing her death. Two days later, Hong's current boyfriend discovered her, lying dead on her living room floor.

Although no witnesses saw petitioner enter or leave the apartment, the police discovered a bag of bloody clothing obviously worn by the killer in the middle of Hong's living room. The police also learned that petitioner and Seong had attacked another of petitioner's former girlfriends, Diane Kim, and went to interview petitioner and Seong that evening. During their interview with Seong, the police first showed Seong photographs of the bloody clothes and then the clothes themselves. Seong broke down in tears and told the police that the sweatpants

were petitioner's and that, while the sweatshirt had been hers, he often wore it.

Both the New York City Police and the FBI examined the clothing. DNA testing revealed that the blood on the clothing belonged to Hong. Fibers from the clothing matched fibers taken from Seong's car, which petitioner often drove, and Seong's apartment, where petitioner was living at the time of the murder. DNA analysis of hairs recovered from the clothes revealed them to be petitioner's. Finally, a bloody partial footprint left on some papers that were scattered on Hong's living room floor matched petitioner's foot.

Petitioner appealed his conviction to the New York State Supreme Court, Appellate Division, First Department. He argued, among other things, that he was denied his right to present his defense by the prosecutor's refusal to grant Seong immunity so that she could testify on petitioner's behalf; that the introduction of Seong's statements to the police, including those concerning the ownership of the bloody clothes, violated his confrontation rights; and that the prosecutor should not have been permitted to introduced Hong's "telephone" statements that petitioner had called and then that he had arrived.

In a unanimous opinion, the First Department rejected these claims and affirmed petitioner's conviction. On May 1, 2003, petitioner sought leave to appeal from that affirmance to the New York Court of Appeals. By order dated January 2, 2004, the Court denied that request.

In his petition before this Court, petitioner raises these same claims. It is respectfully submitted that petitioner has failed to present any reasons for this Court to grant his request for a writ of certiorari. As discussed

below, petitioner's assertions of constitutional harm are based on an inappropriately selective reading of the trial record. First, a complete review of that record reveals that petitioner never asked that Seong be granted immunity and that he would not have been not entitled to that grant had he made the request. Second, it was petitioner who sought the introduction of Seong's statements to the police and he should not now be heard to complain that those statements were admitted. Finally, this Court is without jurisdiction to consider the admissibility of Hong's statements to Celine Oh concerning petitioner's arrival at her apartment.

ARGUMENT

I. Petitioner's Assertions That He Was Denied A Right To Present A Defense When The Prosecutor Refused His Request To Grant Immunity To Claudia Seong, And That He Was Denied The Right To Confront His Accusers When One Of Seong's Statements To The Police Was Introduced At Trial, Are Meritless.

Because the issues of Claudia Seong's immunity and the trial court's admission of her statements to the police about the bloody clothes are so closely linked, they are dealt with together here. A complete review of the record reveals that petitioner never requested that Seong be granted immunity; that even had he made such a request, the prosecutor had compelling reasons to refuse; and that the trial court did not permit constitutionally offensive hearsay to be introduced at trial.

A. The Relevant Record

1. Motion Practice

At a number of court appearances and in papers filed by the defense, petitioner's attorney made clear that he intended to argue that either Claudia Seong, Jae Young Shin[1] or both had killed Lynda Hong. The People filed a motion to preclude the defense unless petitioner could provide reliable evidence supporting those theories. Petitioner's attorney then sent a series of letters to the court outlining the evidence that supposedly connected both individuals to the crime. He noted that the prosecutor had previously sent him a letter in which she had disclosed that both Shin and Seong had made statements to the police. Seong had told them, among other things, that the sweatshirt removed from the crime scene belonged to her. Petitioner informed the court that he anticipated that both Seong and Shin[2] would be unavailable to testify at trial and that he therefore intended to develop his defense theories either by introducing a portion of the People's letter summarizing Shin's and Seong's statements to the police or

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[1] Shin was a friend of petitioner's and Seong's and had been interviewed by the police on several occasions. According to statements that Seong made to the police, she had directed Shin to inform Hong that petitioner had a new girlfriend, that he was severing ties with his old friends, and that Hong was to avoid him if she saw him on the street. Seong also told the police that, on the night before Hong's death, Shin had visited with petitioner and Seong. At that time, Shin told Seong that he had spoken with Hong that day and that she had remarked that, since petitioner had ended his relationship with her, he had become involved with prostitutes. Seong had become so enraged by this insult that she had slapped petitioner.

[2] Shin had returned to Korea prior to trial.

by cross-examining the People's police witnesses about those statements. The prosecutor objected that these statements were inadmissible under New York's rules of evidence.

In an oral ruling issued prior to trial, the court informed petitioner that it would permit him to introduce two paragraphs of the hearsay statements that counsel had quoted in his motions. Those statements included that Seong had told the police that the clothes that had been recovered from the crime scene were hers. The court found that this latter statement constituted a statement against penal interest and was therefore admissible.

2. The Issue of Claudia Seong's Immunity

As the trial court's ruling was predicated on Seong's unavailability, petitioner's attorney arranged for her to appear in court to resolve that issue. When she appeared, petitioner's attorney informed the court that counsel for Seong had informed him that Seong intended to invoke the Fifth Amendment on any questions relating to petitioner, Lynda Hong, Jae Young Shin and Diane Kim.[3] Petitioner's counsel asked that Seong be compelled to claim this privilege in front of the jury. Petitioner's attorney argued, among other things, that the unique context of the case made Seong's presence in front of the jury imperative. He reminded the court that the prosecutor had argued, in her opening statement, that Seong was a manipulative, jealous

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[3] At the time of trial, both petitioner and Seong were under indictment in New Jersey for their attack on Diane Kim, a former girlfriend of petitioner's. The two of them, along with Seong's sister, had driven Kim to a secluded area in Edgewater, New Jersey and slashed her face, forehead and thigh with a razor.

woman who had provided the impetus for this murder when she became enraged that Hong had called her a prostitute. Counsel also pressed the point that he had argued in his opening, that either Seong or Shin, or both, were the real killers.

The prosecutor opposed this request. She asserted that the People would be most prejudiced by Seong's presence before the jury. The prosecutor noted that any procedure to ascertain whether Seong would refuse to testify was being conducted for petitioner's benefit since he was the one who was seeking to introduce the statements that Seong had made to the police. The prosecutor reminded the court that she had objected, and continued to object, to the introduction of this hearsay. She also asserted that, as a result of Seong's unavailability, the People were harmed as they could not elicit that petitioner had brought Hong's wallet to Seong to prove that he had killed Hong and that, when he showed Seong the wallet, he told her that he had committed the murder for her.[4] Thus, she asked that

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[4] In his petition, petitioner quotes that portion of the prosecutor's opening in which she told the jury that they would hear testimony that, after petitioner killed Hong, he returned to Seong's apartment and told her "what he had done for her, and that he had done it for her" (Petition at 4). He states that she made these statements, "[k]nowing full well . . . that Seong would be invoking the Fifth Amendment were she called" (id.), in order to suggest that the prosecutor was attempting to put evidence before the jury surreptitiously, aware that it would never be admitted. This is a complete distortion of what occurred. At the conclusion of her opening remarks, petitioner moved for a mistrial based on those statements. The prosecutor stated that she had understood, based on an earlier discussion, that petitioner had been permitted to elicit that Seong had told the police of petitioner's confession. The court corrected her and explained that when defense counsel had asked to introduce the

Seong make her invocation outside of the jury's presence. Counsel insisted that fundamental fairness mandated that Seong appear in front of the jury to invoke the privilege.

Petitioner's counsel countered the prosecutor's suggestion that Seong was unavailable to both sides. He argued that the prosecutor could make Seong available to the People by granting her immunity. Thus, he maintained, her assertion that the People were somehow prejudiced by her unavailability was simply disingenuous. Counsel did not ask that the People be obliged to grant immunity to Seong so that she could testify for the defense.

The court denied counsel's request and conducted a hearing outside the presence of the jury. Seong avowed that, if called to testify, she would respond to all questions concerning petitioner, Lynda Hong, and Jae Young Shin by invoking her fifth amendment right against self-incrimination.

3. Detective Robert Mooney's Testimony

On direct examination, Detective Robert Mooney testified that, on March 20, 1998, he was assigned to investigate Lynda Hong's death. He interviewed petitioner and Claudia Seong later that afternoon. During his interview with Seong, he showed her photographs of the

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statement, but not for its truth, the court had ruled that if petitioner wanted to elicit it, then the prosecutor would be permitted to argue its truth. Counsel then had withdrawn his request. In short, the prosecutor had simply been mistaken as to what hearsay evidence had been admitted and made her remarks because she believed that the jury would hear the evidence she mentioned. She was not trying to put inadmissible hearsay before the jury or in any other way acting inappropriately.

bloody clothes that had been removed from the bag found in Hong's living room. Seong began to cry uncontrollably and told the detective that the pants were petitioner's and that, while the shirt was hers, he wore it often. Detective Mooney then took Seong to the laboratory where the clothes were being examined and arranged that they be shown to her. When she saw them, she again burst into tears, repeating that the pants were petitioner's and that he often wore her shirt.

Petitioner's attorney interposed only general objections to this testimony.[5] Then, on cross-examination, he asked the detective whether, when Seong looked at the photographs of the bloody clothes, she had said that both the pants and the sweatshirt had belonged to petitioner. Mooney agreed that she had made that statement and that he had written that down in one of his reports.

Petitioner's counsel also produced a document and asked Mooney to review it. At that point, the court excused the jury and informed counsel that he could not question the detective about the statements on the document.[6] Counsel protested that he should be permitted "under the Confrontation Clause" to cross-examine Mooney about the full extent of the conversation memorialized on the document, and not simply be limited to the words on the

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[5] As a matter of New York state law, general objections, which by their nature fail to inform the court of the rationale for the objection, are insufficient to preserve a complaint for review by the appellate courts. People v. Everson, 100 N.Y.2d 609, 767 N.Y.S.2d 389 (2003); People v Tevaha, 84 NY2d 879, 620 N.Y.S.2d 786 (1994).

[6] The record does not reveal the identity or content of the document, other than that it was something that had been supplied by the prosecutor.

page. He went on to complain that the trial court had improperly permitted the prosecutor to elicit Seong's statements to Mooney, when petitioner was the one who had demonstrated Seong's unavailability and therefore was the one who had the "right" to elicit the testimony. The court explained that the prosecutor was entitled to introduce evidence that petitioner had asked the court to admit. Petitioner argued that, nonetheless, the Confrontation Clause permitted him to cross-examine the detective as to the accuracy of his rendition of those statements. The court informed him that it had allowed him that right and then terminated the discussion on that matter.

By his other questions, petitioner's counsel suggested that the police had arrested petitioner so that they could conduct a press conference and announce that they had solved the murder, rather than because the evidence dictated that he was the killer. Thus, on re-direct, the prosecutor asked whether Detective Mooney's decision to arrest petitioner was based, in part, on information provided by Seong. Petitioner's counsel objected and a colloquy was conducted outside the presence of the jury. The prosecutor explained that she sought to introduce the fact that Seong had relayed that petitioner had confessed to her to counter petitioner's claim that the arrest was premature and that the police had manufactured evidence against petitioner. Counsel protested that the prosecutor should not be permitted to introduce Seong's hearsay but rather should be required to call Seong to testify in order to permit petitioner to cross-examine her.

The court then denied the prosecutor's request to elicit this information from the detective. As the prosecutor had not received an answer to her question as to whether the arrest was based, in part, on information provided by Seong, she asked that she be allowed to elicit a simple yes

or no to that question without exploring what that information was. Counsel protested that even this answer would prejudice him as it would not allow him to conduct cross-examination. He reiterated that the prosecutor could grant Seong "the immunity that [Seong] has been begging for" and then call her to testify. After further discussion, the court precluded the prosecutor from obtaining any answer to this question.

B. Petitioner's Claim That He Was Denied Due Process When The Prosecutor Did Not Grant Claudia Seong Immunity So That She Could Testify On His Behalf Is Based On A Distortion Of The Record And Does Not Present A Compelling Question For Review By This Court.

Petitioner now claims that the prosecutor's refusal to grant Claudia Seong immunity presents a compelling issue that merits review. He notes that this Court has not delineated a standard which trial courts can use to determine whether a prosecutorial refusal to grant immunity deprives a criminal defendant of his right to present a defense. Petitioner's assessment that this case merits such review is incorrect for several reasons.

To begin, as the review of the record, supra, makes clear, petitioner never asked that the prosecutor grant Seong immunity so that she could testify on his behalf. Petitioner's only references to immunity came in his complaints that the prosecutor had introduced Seong's statements to the police in the People's direct case. However, petitioner was not asking that Seong receive immunity so that she could testify as a defense witness.

Rather, his complaint was that, as an evidentiary matter, Seong was not unavailable to the prosecutor, since she could grant the witness immunity. As Seong was unavailable to the defense, who did not have that same option, only the defense should be permitted to introduce the hearsay statements that Seong made to the police.

To be sure, petitioner is correct that the New York Supreme Court, Appellate Division First Department did hold that petitioner was not deprived of his constitutional rights by the prosecutor's refusal to grant immunity. Thus, as his federal claim was addressed by the state court, this Court does have jurisdiction to entertain it. Adams v. Robertson, 520 U.S. 83, 117 S.Ct. 1028 (1997). But as the record makes plain that petitioner was denied nothing, his immunity claim is untenable. Moreover, petitioner's failure to raise the claim at the trial level renders the record incomplete, to the detriment of the prosecutor. After all, because petitioner never asked that Seong be granted immunity, he deprived the prosecutor of the opportunity to make a record as to her theory of Seong's liability or the investigatory steps that the prosecutor and the police had undertaken and would continue to undertake in order to ascertain Seong's role in the murder. It is therefore respectfully submitted that this Court decline petitioner's request for review.

In any event, petitioner has failed to demonstrate a compelling legal issue that requires resolution by this Court. Petitioner's arguments in that vein are two-fold. He asserts, first, that New York state has essentially no test by which to resolve when a prosecutor abuses her discretion in refusing a defense request to grant a witness immunity. He then claims that the federal appeals courts utilize two different tests and that resolution by this Court is necessary. Petitioner is simply incorrect on all fronts.

To begin, the test utilized by the courts of New York state is hardly "nebulous," as petitioner claims (Petition at 15). The New York Court of Appeals has held that a prosecutor abuses her discretion when 1) she refuses to immunize a defense witness in order to prevent a criminal defendant's access to a police informant active, as a government agent, in the commission of the crime at issue; 2) the prosecutor has built her case on immunized testimony but denies the defendant a similar opportunity; 3) the prosecutor affirmatively threatens the defendant's witness with prosecution for perjury if the witness gives evidence favorable to the defense; or 4) the prosecutor's failure to grant immunity deprives a defendant of vital exculpatory testimony. People v. Owens, 63 N.Y.2d 824, 825-26, 482 N.Y.S.2d 250, 250-51 (1984); People v. Shapiro, 50 N.Y.2d 747, 760, 431 N.Y.S.2d 422 (1980); see also, People v. Sapia, 41 N.Y.2d 160, 399 N.Y.S.2d 93 (1976). This test provides a trial court with clear guidelines as to how to address the issue.

Furthermore, the two tests utilized by the federal courts differ only by small degree from one another. The "effective defense" standard permits a court to grant immunity even when the prosecutor has refused to do so only when the court finds that the defense witness could offer testimony that was clearly exculpatory and essential, and that the prosecutor did not have a strong interest in withholding immunity. See United States v. Angiulo, 897 F.2d 1169, 1191-92 (1st Cir. 1990). Pursuant to the "prosecutorial misconduct test," a court may order the prosecutor to grant immunity if it finds that prosecutor abused her discretion by attempting to distort the fact-finding process and that the witness's testimony would be exculpatory. A prosecutor abuses that discretion by harassing or intimidating witnesses to discourage them

from testifying or by deliberately withholding immunity from defense witnesses for the purpose of keeping exculpatory evidence from the jury. United States v. Bahadar, 954 F.2d 821, 826 (2d Cir. 1992); United States v. Angiulo, supra. The misconduct test simply gives more detail to the "effective defense" test; however, both require the court to find that the witness's testimony would exculpate the defendant and that the prosecutor has no legitimate reason for refusing to grant the witness immunity. Put differently, there is no need for this Court to grant review of petitioner's case in order to harmonize two tests that are already so similar.

But, even assuming that some harmonization is required on the federal side, it is respectfully submitted that this case does not provide the appropriate vehicle by which to achieve that goal. The New York test is broad enough to encompass both federal tests. Just as in the "effective defense" test, a New York prosecutor may have to provide immunity to an informant with exculpatory evidence or when the prosecution has sought to keep exculpatory witnesses off the stand. Furthermore, similar to the "prosecutorial misconduct test," a New York trial judge may find that a prosecutor who has taken affirmative steps to discourage a defense witness from testifying, such as by threatening that witness unjustly with prosecution for perjury, has acted improperly and can then compel the prosecutor to grant the witness immunity. As New York's test encompasses both federal standards, then, any reconciliation of those two federal tests would have no effect upon New York law in this area.

Relatedly, no matter which test is applied here, the results would still be the same since, even on this limited record, it is clear that petitioner was not entitled to have Seong testify under a grant of immunity. First, under New

York law, the prosecutor clearly would not have abused her discretion by refusing to grant Seong immunity. Seong was not a police informant: she had not been acting at the behest of the government at the time that Hong was murdererd. The People had not built their prosecution on immunized witnesses. Nor has petitioner ever established that Seong possessed information that exculpated petitioner. He has never provided proof that suggested, even remotely, that Seong participated in the crime and, at the same time, petitioner did not. Additionally, as noted above, it was Seong who told the police that the bloody clothes worn by killer belonged to petitioner.

Petitioner would fare no better under either federal test. Because both require some proof that the witness possessed exculpatory information, petitioner's claim that immunity should have been conferred would fail in the first instance. But, even had petitioner managed to satisfy this prong, he still could not prevail. In order to satisfy the other prong of the prosecutorial misconduct test, petitioner would have had to establish that the prosecutor either intimidated Seong to encourage her to refuse to testify or sought to keep exculpatory evidence from the jury, United States v. Badahar, supra, and he has never alleged either. Nor could he have proved such allegations, even had he made them. As the prosecutor noted, Seong's insistence on invoking her privilege potentially kept highly incriminatory evidence, namely petitioner's confession to Seong that he had committed the killing, from the jury. Thus, she had no interest in prevent Seong from taking the stand, only in doing so with immunity.

Finally, under the effective defense test, a prosecutor cannot be compelled to grant immunity if she has a strong interest in withholding it, United States v. Anguilo, supra, something the prosecutor clearly did here.

It is worth noting that in New York, there is no power to compel testimony with a grant of "use" immunity. Rather, a witness receiving immunity cannot be "convicted of any offense or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he gave immunity. . . ." New York Criminal Procedure Law Section 50.10. Thus, had Seong received immunity for her testimony, she would have escaped prosecution for any crime in connection with Hong's murder. As petitioner has impliedly conceded by his reference to the prosecutor's theory that petitioner had killed Hong in order to ingratiate himself with Seong (Petition at 3), the prosecutor believed that Seong was involved in some way in the killing.[7] She therefore clearly had a strong interest in withholding immunity from this possible accomplice to the murder.

In sum, all of petitioner's rationales for the necessity of review by this Court are unavailing. Thus, this Court should deny his request for a writ of certiorari.

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[7] Petitioner refers to a portion of the prosecutor's opening statement in which she told the jury that petitioner went to Hong's apartment by himself to commit the murder. Petitioner claims that, "by this statement [the prosecutor] completely eliminated the personal involvement of Claudia Seong in the charged murder" (Petition at 4). Such an assertion is utterly meritless. The fact that the People did not contend that Seong was present in Hong's apartment at the time of the killing was hardly the equivalent of a concession that Seong bore no liability in the crime. And, indeed, in her summation the prosecutor noted that that Seong might well have acted as an accomplice by urging petitioner to commmit the murder but that her role was irrelevant to the trial issue, which was petitioner's guilt or innocence.

C. As It Was Petitioner Who Requested That Seong's Statements To The Police Be Admitted, Their Introduction Did Not Violate This Court's Holding In Crawford v. Washington, __ U.S. __, 124 S.Ct. 1354 (2004).

Petitioner next asks this Court to evaluate the case under the principles enunciated in Crawford v. Washington, __U.S. __, 124 S.Ct. 1354 (2004). He focuses on Seong's statement to the police that the bloody pants found in a bag in Hong's apartment belonged to petitioner and that, while the shirt belonged to her, petitioner often wore it. He maintains that this statement constituted "testimonial hearsay" and that its admission into evidence offends the Constitution. Again, however, petitioner supports this claim by a distortion of what occurred at trial. As a complete review of the record makes clear, it was petitioner, and not the prosecutor, who asked that the court permit Detective Mooney to testify that Seong told the police who owned the clothes; the prosecutor unsuccessfullly opposed the application. Thus, the introduction of this evidence at trial could not offend the Confrontation Clause. Lilly v. Virginia, 527 U.S. 116, 130, 119 S.Ct. 1887 (1999).

To be sure, once the court granted petitioner's request, it did permit the prosecutor to introduce the statements in her case-in-chief, rather than insist that only petitioner could elicit them on cross-examination of the witness. However, certainly that could not offend the Confrontation Clause. For the most part, the prosecutor did not elicit more than petitioner had asked for or than the

court had allowed. It is true that Detective Mooney testified that Seong told him that the pants belonged to petitioner and the shirt was hers, while petitioner's offer of proof was that Seong had told the police that all the clothing was hers. However, petitioner's reaction at trial demonstrated that that discrepancy was of no moment. Petitioner's lawyer, who had appeared often at trials in courts in New York state, made only general objections to that testimony, thereby failing to suggest that the testimony was not what he anticipated and preserve any complaint he had about this discrepancy for review by any New York appellate court. And, before the trial court, he never announced that he was, in fact, taken by surprise by it. Instead, on cross-examination, he purposefully elicited from Mooney that Seong had said something even more inculpatory as to petitioner -- that all of the clothing was his. Clearly, he thought that Seong's attempts to make petitioner the owner of the clothing was helpful to his defense, in that she was too eager to shift the blame to another. If Seong's statements were useful for petitioner's defense, then, it should have made no difference which party introduced them.

Simply put, the only reason that the jury heard the testimony about which petitioner now complains is because petitioner requested that it be introduced. Thus, there is no compelling issue that merits review by this Court.

II. Petitioner Failed To Raise A Federal Question In State Court As To The Admissibility Of Hong's Statements To Celine Oh, And His Assertion That The Statements Violated The Holding In Crawford Is Without Merit.

Petitioner next turns to the admission of two statements made by Lynda Hong shortly before her death to her friend, Celine Oh. In the first, Hong announced that petitioner had just called and was on his way over. Then, a few minutes later, Hong stated that petitioner had arrived. Petitioner suggests that this Court review the admissibility of this evidence under the Confrontation Clause.

To begin, this Court is without jurisdiction to hear this claim, as petitioner did not raise a federal question either at trial or on his direct appeal and the state court's decision rested only on state law. 28 U.S.C. §1254; Adams v. Robertson, 520 U.S. at 83, 117 S.Ct. at 1024; Illinois v. Gates, 462 U.S. 213, 218, 103 S.Ct. 2317 (1983). In the motions that he filed prior to trial, petitioner asserted that the prosecutor would be unable to establish that these statements satisfied the requirements for statements of future intent under the Hillmon doctrine: New York's rules of evidence required that the proffered statement unambiguously contemplate some future action by the declarant and, petitioner claimed, Hong's statements did not satisfy that requirement. Petitioner also asserted that Hong's statements did not satisfy the "present sense impression" exception to the hearsay rule, since the prosecutor could introduce statements under that exception only if their accuracy were corroborated by the presence of another witness and, as none existed, the prosecutor would be unable to meet her burden. In other words, petitioner never raised the claim that hearsay upon which the

prosecutor would be relying violated the Confrontation Clause of the Federal Constitution, only that the prosecutor could not meet the burdens imposed under New York's rules of evidence.

Even on his direct appeal to the New York Supreme Court, Appellate Division, First Department, petitioner did not raise constitutional claims. Petitioner simply reiterated those arguments made before the trial court that the prosecutor could not meet the requirements of New York law for the admission of statements of future intent and that the prosecutor failed to provide the necessary corroboration to introduce the statements under the present sense impression exception to the hearsay rule. As a result, the Appellate Division rendered its decision rejecting petitioner's complaints based solely on New York State's rules of evidence and did not rule on any federal issues. People v. Ko, 304 A.D.2d at 451-52, 757 N.Y.S.2d at 561. Thus, this Court is without jurisdiction to review this claim.

In any event, petitioner cannot demonstrate that his claim merits consideration by this Court. Petitioner concedes that Hong's statements to Oh were not "testimonial." In Crawford, this Court stated that the holding in that case was limited to testimonial hearsay; statements between civilians were still governed by the test enunciated in Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531 (1980). Under that test, out-of-court statements can be admitted at trial, without offending the Sixth Amendment, so long as the prosecutor can demonstrate that the declarant was unavailable and that the statements bore sufficient indicia of reliability. Crawford v. Washington, supra. As petitioner no longer contests, the prosecutor satisfied her burdens as to both portions of Hong's statements before the trial court.

Simply put, as petitioner has failed to establish that this Court has jurisdiction to hear this claim and also has offered no basis upon which Hong's conversation with Oh should have been excluded, his request for review must be rejected.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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